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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1051

HEALTH-MOR, INC., A CORPORATION,
Petitioner,

vs.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

ARTHUR ABRAHAM,
WALTER A. WADE,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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REPLY BRIEF OF PETITIONER.

I.

Petitioner Possesses a Substantial Legal Interest in the Documents Sought to Be Produced.

Counsel argues that the Bank was the sole owner of the documents. This is not correct. The Answer of both the Bank (R. 37) and Health-Mor, Inc. (R. 52) sets up the joint ownership of the documents. This stands admitted on the record.

Leaving that question aside, however, the argument of Respondent ignores the reality of the situation presented. The Administrator does not seek to acquire the legal title to the documents. He does not propose to confiscate them.

The legal title to the documents is not the property interest sought to be protected.

Petitioner has a settled property interest in the "trade information and list of customers". This property interest is uniformly recognized and protected by the courts.

Board of Trade v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, (Affirming CCA7).

Bausch & Lomb Optical Co. v. *Wahlgren*, 1 F. Supp. 799, 801; Affirmed 68 F. 2d 660; Certiorari denied 292 U. S. 639; Rehearing denied 292 U. S. 615.

Union Switch & Signal Co. v. *Sperry*, 169 Fed. 926 (C.C. S.D. N.Y.).

Witkowsky v. *Affeld*, 283 Ill. 557.

Counsel cites cases (Respondent's Brief p. 7) for the proposition that a National Bank, a stock broker or an employee, has no absolute privilege against the disclosure of information obtained from a depositor, a customer or an employer. We do not contend that if the information sought to be produced were *relevant* that the circumstance that it had been deposited with a bank would give the bank an absolute privilege against disclosure. We do not contend that there is an absolute privilege as obtains in the case of lawyer and client, physician and patient, or priest and penitent. We do contend, however, that the circumstance that the bank has possession of the documents does not deprive HEALTH-MOR, INC. of its right to question the *relevancy* of the documents sought to be elicited from the bank. We contend that having a definite property interest in the information sought to be elicited, the mere circumstance that the documents containing this information were deposited with the bank does not deprive HEALTH-MOR, INC. of its right to be heard upon the issue of relevancy. (*Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, (Affirming CCA 7).)

The case of *Bowles* v. *Shawano National Bank*, 151 F. 2d 749, certiorari denied, 327 U. S. 781, is cited by counsel and was erroneously relied upon by the Circuit Court of Appeals, Seventh Circuit, in its Memorandum Opinion. No question of the intervention was involved in that case. No question of relevancy was involved. The Bank failed to raise the question of relevancy in its pleadings and before the trial court. Therefore, the Shawano National Bank case stands for nothing more than the proposition that there is no absolute privilege on the part of a National Bank from responding to an Administrative Subpoena. We have never made such a contention in the case at bar. We do contend, however, that Petitioner has the right to demonstrate that the books and documents sought by the Administrator are *irrelevant and immaterial.*

II.

Petitioner Is Bound By the Judgment of the Trial Court Entered November 11, 1946, Requiring the Divulging of the Secret Trade Information and Lists of Customers of Petitioner.

Counsel argue (Respondent's Brief p. 8) that Petitioner is not bound by a judgment directing the bank to allow an examination by the Administrator. Obviously petitioner is bound by this judgment. The judgment deprives the petitioner of its property interest in secret trade information and lists of customers. It constitutes no answer to say, as counsel do, that petitioner does not thereby lose its rights to object to the admissibility of the documents as evidence in another separate and different proceeding —the enforcement proceeding. We are not here concerned with the admissibility of evidence in the enforcement proceedings, but we are concerned with the protection of Petitioner's rights and property contained in the books

and documents. Only by being granted the right to intervene can this be accomplished.

III.

The Representation of the Interest of Health-Mor, Inc. By the Original Respondent Is or May Be Inadequate.

Counsel suggest (Respondent's Brief p. 8) that Petitioner's interests were adequately represented by the bank because of the bank's answer and because it filed an Appeal after the dismissal of Petitioner's Appeal by the Circuit Court of Appeals. This misapprehends the point. The most substantial interest in the trade information and customer's list lies in the petitioner. While we are grateful for the loyal assistance of the bank to its customer, it is obvious that the protection of a substantial property interest belonging to Petitioner should not rest merely upon the continued favor of its banker. The bank obviously does not have the same interest in the protection of the trade information and the list of customers that petitioner does. The protection of a valuable property interest should not depend upon the mere continued goodwill of Petitioner's banker. In no legal sense does the bank represent the Petitioner. It has no legal obligation to do so.

IV.

Petitioner Was Entitled to a Hearing Upon the Issue of Relevancy and Materiality.

Counsel argue otherwise (Respondent's Brief pp. 8-9). They say (Respondent's Brief p. 9) "Under such circumstances no taking of evidence at a hearing was required". For this proposition they cite cases in which facts disclosing the materiality of the documents sought were ad-

mitted by defendants' pleadings or by defendants' testimony. In not one of these cases was it held or even hinted that defendant would not be entitled to introduce any competent testimony that he chose upon the issue of irrelevancy.

These cases clearly indicate the contrary. Our research has failed to disclose any reported case in which the court refused to permit defendant a hearing upon the issue of *relevancy*. Yet, that is precisely what the trial court did in this case. The trial court was sustained by the order of the Circuit Court of Appeals dismissing Petitioner's Appeal, "on authority of *Bowles* v. *Shawano National Bank*, 151 F. 2nd 749" (R. 116) in which the questions of relevancy and materiality, and the right to intervene, were never raised or considered by the Court.

V.

The Records and Documents Sought to Be Produced Were Not Relevant or Material to Any Investigation Instituted By the Price Administrator.

Neither the application nor the subpoena asserts that the documents in question were sought in aid of any pending proceeding. Neither the subpoena nor the application indicates the nature or character of the alleged investigation, nor discloses any possible relevancy of the documents sought to be produced. No evidence was taken. The oral speculations of counsel as to a possible purpose can not change the circumstance that no relevancy and no materiality, either general or otherwise, of the documents sought to be produced appear in the record.

Respectfully submitted,

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WALTER A. WADE,
Counsel for Petitioner.